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No. 87-996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

COIT INDEPENDENCE JOINT VENTURE,
Petitioner,

v.

FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION,
AS RECEIVER FOR FIRSTSOUTH, F.A.
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

OBJECTION TO THE MOTION OF THE FEDERAL HOME LOAN BANK OF DALLAS, FEDERAL HOME LOAN BANK OF SAN FRANCISCO, AND FEDERAL HOME LOAN BANK OF TOPEKA FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

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Pursuant to Rule 36 of the rules of this Court, Petitioner Coit Independence Joint Venture ("Coit") objects to the request of the Federal Home Loan Bank of Dallas, the Federal Home Loan Bank of San Francisco, and the Federal Home Loan Bank of Topeka (hereinafter sometimes the "Banks") to file an amici curiae brief supporting affirmance of the court of appeals' judgment. Coit objects on the grounds that (1) the Banks have not complied with all prerequisites to filing such brief, and (2) the Banks are instrumentalities of the federal government, whose interests are already represented by the Solicitor General, and therefore should not be permitted to simultaneously present a legal position contrary to that of the Solicitor General.

First, Coit objects on the ground that the Banks failed to comply with all prerequisites to filing their brief. Specifically,

the Banks did not seek the consent of Coit prior to filing their motion. The Banks' proposed brief was filed in manuscript form on June 17, 1988, the due date for the Solicitor General's brief. However, no effort to seek Coit's consent for the filing of the Banks' brief was made until June 20, 1988, three days after the deadline for filing, even though Coit's brief has been on file in this case since May 5, 1988. Rule 36 of this Court's rules contemplates the filing of a motion for leave only after consent has been sought and "refused." Here, the motion for leave was filed first and consent was sought only *after the fact*. Since the request for consent was "untimely," the prerequisites for such a motion were not met and the motion should be denied.

Second, Coit objects on the ground that the Banks' motion constitutes an attempt by instrumentalities of the federal government to present simultaneous and contradictory responses to Coit's legal arguments. Of central concern in this case is whether Congress granted to FSLIC, as receiver, the exclusive authority to adjudicate the validity of state law causes of action asserted against failed savings and loan associations under FSLIC receivership. The Solicitor General, on behalf of FSLIC, has taken the position that Congress did *not* grant FSLIC such power. *See* Brief for the Respondent at 16 ("We believe that where, as here, a creditor's suit is already pending in court when the Bank Board appoints FSLIC as receiver, the claimant's obligation to exhaust the administrative claims process does not deprive the court of jurisdiction."); *see also id.* at 20, n. 13 ("The Bank Board . . . has asserted that the process of allowing or disallowing claims is an administrative "adjudication" subject to judicial review under the [APA]. The Solicitor General does not endorse that position . . . ."). By contrast, the Federal Home Loan Banks, as amici curiae, espouse the position that FSLIC *has* exclusive authority to adjudicate claims against failed savings

and loan institutions in the first instance, subject only to review by the Bank Board and judicial review under the APA. *See* Banks' proposed brief at 1-3.

Coit objects to the Banks' attempt to present a response to Coit's legal position which is contrary to that taken by the Solicitor General. As admitted by the Banks in their motion, "[e]ach District Bank is a federal instrumentality organized in the form of a corporation." Banks' Motion for Leave at 1. This conclusion is also based upon federal statutes and regulations. First, 12 U.S.C. § 1437 establishes the Federal Home Loan Bank Board (the "Board") as an independent agency of the executive branch of the federal government. In turn, 12 U.S.C. § 1423 empowers the Board to establish the Federal Home Loan Banks. Moreover, 12 U.S.C. § 1431(a) states that the powers of the Federal Home Loan Banks are subject to the rules and regulations of the Board. Finally, 12 C.F.R. § 501.11 of the Board's regulations designates the President of each Federal Home Loan Bank as the "Principal Supervisory Agent" of the Board and FSLIC, who may in turn appoint other officers and/or employees of such Banks as additional "Supervisory Agents" of the Board and FSLIC. This regulation empowers such agents to, *inter alia*, "represent the Board and [FSLIC] in supervising and examining Federal savings and loan associations and other institutions in the Bank's district which are insured by [FSLIC]."

The interests of the Banks, as instrumentalities of the federal government, are already represented by the Solicitor General, who is charged by statute with the duty to represent the United States before this Court. *See* 28 U.S.C. § 518 ("[T]he Solicitor General *shall* conduct and argue suits and appeals in the Supreme Court . . . in which the United States is interested"). (Emphasis added). If the United States is permitted to file additional briefs and speak, like Cerberus,

with many heads through a multitude of its instrumentalities, then not only can it undermine the limitations imposed by 28 U.S.C. § 518 (which requires the United States to present its case before this Court in an orderly manner through a single spokesman), but it can also present such an array of arguments and positions that opposing counsel will be overwhelmed and unable to effectively answer the United States within the page limitations allowed by this Court's rules. Furthermore, the contrary positions taken by the Solicitor General and the Banks in this case reflects an intra-governmental dispute which properly should be resolved prior to coming to this Court. The Banks' brief is the brief of a party, not amici curiae.

For the foregoing reasons, the motion of the Federal Home Loan Bank of Dallas, the Federal Home Loan Bank of San Francisco, and the Federal Home Loan Bank of Topeka to file an amici curiae brief in support of affirmance of the court of appeals should be denied.

Respectfully submitted,

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